14 February 1978

DoJ

MEMORANDUM FOR THE RECORD

STAT FROM : [redacted]
Assistant General Counsel

SUBJECT : S. 1437 (Son of S.1); Meeting with Department of Justice to Discuss Potential Impact on CIA Activities

REFERENCE : [Note to General Counsel, 27 January 1978]

STAT 1. On 9 February [redacted] OLC, [redacted] and I met with Ron Gainer* STAT and Roger Pauley,** the principal DoJ officials handling S. 1437, to discuss the potential impact of the legislation on CIA activities. See reference for background on the events leading up to this meeting.

2. We summarized for Mr. Gainer our concern that numerous provisions of the new code (see reference) appear to criminalize certain activities which the Department has previously assured us are within CIA's authorities, that there is no express statutory or report language which makes it clear that such lawful activities are not covered, that recourse to asserting a vague public authority defense based on dated and not particularly relevant case law was not a satisfactory solution considering the attention currently directed at intelligence community activities and that it would be far better if the lack of such appropriate authority were an element of an offense rather than a defense.

3. Gainer responded with the same arguments he has made on previous occasions--that there never was any intent to criminalize governmental activities, that no prosecutor would ever opt to challenge lawful intelligence activities, and that if one did CIA officials would have a complete defense based upon the exercise of public authority and reliance on misstatements of law defenses. Moreover, he argued that there was little practical difference between the present bill and our suggested amendment which would define the term "person" as "a government employee acting outside the scope of his lawful authority." Once an intelligence official raised the public authority defense, the prosecution would have to prove

---

*Director of the Task Force on Criminal Code Revision and Deputy Assistant Attorney General, Office for Improvements in the Administration of Justice.

**Deputy Chief, Legislation and Special Projects Section, Criminal Division.

beyond a reasonable doubt that the defendant lacked such authority. Gainer queried whether the problem was really one of more careful statutory delineation of CIA authorities, a problem to be resolved in other contexts such as the intelligence charter negotiations.

4. We pointed out that it will be some time before we get intelligence charters and that even under the best of circumstances the charters would not provide explicit authority for every activity covered by Son of S. 1. More importantly, we have to deal increasingly with Agency employees who look to the express words of statutes to see whether the activities they are asked to undertake are lawful. While it is true that existing criminal statutes, with few exceptions, do not expressly exclude lawful government activities, we had not had an opportunity to clarify them; now that we do have the opportunity in Son of S. 1 we should exert every effort to do so.

5. Gainer assured us that the Department was sympathetic to our arguments for clarity in the law, and that the Department had made every effort to explicitly exclude legitimate governmental activities in the statute by specific defenses in S. 1. Those efforts, however, had been rejected by the Senate for political reasons, although the Department had managed to get an explicit reference in the Son of S. 1 to the exercise of public authority and reliance on official misstatements of law defenses. Gainer said, morever, that the Department would continue to try to get a better accommodation of our interests in the House, where hearings are now being conducted following the recent passage of Son of S. 1 in the Senate.

6. We discussed further possible approaches including (1) the sponsorship of a floor amendment redefining the term "person" in accordance with our suggestion; (2) the issuance of House language which would clarify the intent of the legislation regarding intelligence activities (apparently there will be no House report dealing with provisions item-by-item as in the 1200-plus page Senate Judiciary Committee report), and (3) an Attorney General opinion to the effect that lawful intelligence activities will not be affected by Son of S. 1. Gainer seemed predisposed to pursuing options 2 of 3 and promised that he would do what he could.

7. We warned Gainer, however, that while we preferred to look to the Department as the focal point within the executive branch on Son of S. 1 and not negotiate independently with the committee as did DoD in the Senate, we wanted to take an active role in any initiative he was to take on our behalf. We finally concluded that he would arrange a meeting, which we would attend, with Representative Mann, Chairman of the House Judiciary Committee Subcommittee on Criminal Laws which is handling the legislation, to discuss possible floor amendments or report language. He cautioned, however, that such a meeting

could not be arranged for at least two weeks (which would mean 23 February) and it might take as long as a month. At the same time, we should transmit a request to the Attorney General for an opinion clarifying the impact of Son of S. 1 on intelligence activities; such a request would be passed on to Gainer who promised a favorable opinion.

STAT